IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

MARTIN LEWIS, et al.,

Plaintiffs,

v.

WELLS FARGO & CO.,

Defendant.
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No. C 08-02670 CW

ORDER GRANTING IN PART PLAINTIFF'S MOTION FOR APPROVAL OF HOFFMAN-LA ROCHE NOTICE

Plaintiffs Martin Lewis, Aaron Cooper and Anissa Schilling, on behalf and themselves and a class of those similarly situated, allege that they were misclassified under federal and state wage and hour laws. Plaintiffs move the Court to certify conditionally this action as a representative collective action and to authorize and facilitate notice of this action to prospective collective action members. Defendant Wells Fargo opposes this motion and objects to the notice and opt-in form that Plaintiffs have prepared. The motion was decided on the papers. Having considered

all of the papers filed by the parties, the Court grants in part Plaintiffs' motion for approval of a Hoffman-LaRoche notice.

BACKGROUND

Defendant Wells Fargo is an international corporation providing banking services throughout the United States and the world. SAC ¶ 25. Plaintiffs and the proposed class members provide the installation, maintenance and support of Defendant's technical infrastructure. They are located primarily within Defendant's Technology Information Group (TIG).

Plaintiffs contend that they are owed overtime pay under the Fair Labor Standards Act (FLSA). The FLSA authorizes workers to sue for unpaid overtime wages on their own behalf and on behalf of "other employees similarly situated." 29 U.S.C. § 216(b). Plaintiffs bring this action on behalf of themselves and other similarly situated employees. Unlike class actions brought under Federal Rule of Procedure 23, however, collective actions brought under the FLSA require that each individual member "opt in" by filing a written consent. See 29 U.S.C.A. § 216(b) ("No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought.").

In Hoffmann-La Roche Inc. v. Sperling, 493 U.S. 165 (1989), the Supreme Court held that, "in appropriate cases," district courts should exercise their discretion to authorize and facilitate notice of a collective action to similarly situated potential

plaintiffs.[1] Plaintiffs contend that this is an appropriate case. They request leave to send a Hoffman-La Roche notice to similarly situated technical support workers[2] who are, or have been, employed throughout the country by Defendant at any time since July 19, 2005. According to Plaintiffs, this notice will alert potentially aggrieved individuals that, if they want to pursue a similar claim in this pending lawsuit, they must opt in, and will further the broad remedial goals of the FLSA.

LEGAL STANDARD

As noted above, the FLSA provides for a collective action where the complaining employees are "similarly situated." 29 U.S.C. § 216(b). But the FLSA does not define "similarly situated," nor has the Ninth Circuit defined it. As noted by the Tenth Circuit, there is little circuit law defining "similarly situated." Thiessen v. General Electric Capital Corp., 267 F.3d 1095, 1102 (10th Cir. 2001).

Although various approaches have been taken to determine whether plaintiffs are "similarly situated," district courts in this circuit have used the ad hoc, two-tiered approach. See Wynn v. National Broadcasting Co., Inc., 234 F. Supp. 2d 1067, 1082 (C.D. Cal. 2002) (noting that the majority of courts prefer this

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[1]Although Hoffmann-La Roche involved claims brought under the Age Discrimination in Employment Act (ADEA), because ADEA incorporates § 16(b) of the Fair Labor Standards Act into its enforcement scheme, the same rules govern judicial management of collective actions under both statutes. See, e.g., Shaffer v. Farm Fresh, Inc., 966 F.2d 142, 147 (4th Cir. 1992).

[2]Plaintiffs define technical support workers as those individuals with the primary duties of installing, maintaining, and/or supporting software and/or hardware, including but not limited to network engineers, but excluding PC/LAN Engineers.

approach); see also Thiessen, 267 F.3d at 1102-03 (discussing three different approaches district courts have used to determine whether potential plaintiffs are "similarly situated" and finding that the ad hoc approach is arguably the best of the three approaches); Hipp v. Liberty Nat. Life Ins. Co., 252 F.3d 1208, 1219 (11th Cir. 2001) (finding the two-tiered approach to certification of § 216(b) opt-in classes to be an effective tool for district courts to use). Under this approach, the district court makes two determinations, on an ad hoc, case-by-case basis. The court first makes an initial "notice stage" determination of whether plaintiffs are similarly situated, deciding whether a collective action should be certified for the purpose of sending notice of the action to potential class members. See, e.g., Thiessen, 267 F.3d at 1102. For conditional certification at this notice stage, the court requires little more than substantial allegations, supported by declarations or discovery, that "the putative class members were together the victims of a single decision, policy, or plan." Id. at 1102. The standard for certification at this stage is a lenient one that typically results in certification. Wynn, 234 F. Supp. 2d at 1082.

The second determination is made at the conclusion of discovery, usually on a motion for decertification by the defendant, utilizing a stricter standard for "similarly situated." Thiessen, 267 F.3d at 1102. During this second stage analysis, the court reviews several factors, including the disparate factual and employment settings of the individual plaintiffs; the various defenses available to the defendant which appear to be individual to each plaintiff; fairness and procedural considerations; and whether the plaintiffs made any required filings before instituting

suit. Id. at 1103.

Notably, collective actions under the FLSA are not subject to the requirements of Rule 23 of the Federal Rules of Civil Procedure for certification of a class action. Id. at 1105. "The requisite showing of similarity of claims under the FLSA is considerably less stringent than the requisite showing under Rule 23 of the Federal Rules of Civil Procedure. All that need be shown by the plaintiff is that some identifiable factual or legal nexus binds together the various claims of the class members in a way that hearing the claims together promotes judicial efficiency and comports with the broad remedial policies underlying the FLSA." Wertheim v. Arizona, 1993 WL 603552, *1 (D.Ariz.) (citations omitted).

DISCUSSION

I. Hoffmann-La Roche Notice

Defendant argues that this motion should be decided under the stricter second stage analysis. Here, although volumes of paper have been produced and several witnesses deposed, Plaintiffs state that discovery is nowhere near complete. Defendant has obstinately resisted producing discovery in this case since its inception. In an attempt to file a motion for approval of Hoffman-Laroche notice by January, 2009, Plaintiffs served document requests and a deposition notice in July and August, 2008. However, Defendant resisted producing that discovery until recently, only after repeated intervention by the Court. Defendant did not produce basic job descriptions for other relevant job titles until September 28, 2009, missing the Court-ordered deadline for such production by over seven months. Until recently, Defendant did not schedule depositions that Plaintiffs had requested fourteen months

earlier. Even Defendant does not contend that discovery on the issue of certification is complete; Defendant contends that discovery has been extensive and that additional discovery will not change the facts or analysis that technical support workers are not similarly situated.

To apply the second-tier heightened review at this stage would be contrary to the broad remedial policies underlying the FLSA. After discovery is complete, Defendant can move for decertification, and the Court will then apply the heightened second-tier review.

As noted above, the standard for certification at the notice stage is a lenient one. Courts routinely grant conditional certification of multiple-job-title classes such as Plaintiffs' class. See Gerlach v. Wells Fargo, 2006 WL 824652, at *3 (N.D. Cal.); Wong v. HSBC Mortg. Corp. (USA), 2008 WL 753889 (N.D. Cal.); Beauperthuy v. 24 Hour Fitness USA, Inc., 2007 WL 707475 (N.D. Cal.). Plaintiffs meet their burden of showing that all technical support workers are similarly situated with respect to their FLSA claim: all technical support workers share a job description, were uniformly classified as exempt from overtime pay by Defendant and perform similar job duties. Plaintiffs have submitted deposition and declaration testimony from twenty-seven opt-in class members, as well as documentary and testimonial evidence from Defendant itself, to support the allegations in the complaint and instant motion. This showing satisfies the first-tier standard.

Defendant's fifty-four declarations, mostly from current employees, do not undermine this showing. Plaintiffs meet their burden at the notice stage, and thus the Court need not consider

the declarations at this time. Defendant can re-submit them as part of a motion to decertify the class once discovery is complete. "It may be true that the evidence will later negate plaintiffs' claims, but this order will not deny conditional certification at this stage in the proceedings." Escobar v. Whiteside Constr. Corp., 2008 WL 3915715 (N.D. Cal.).

A. Proposed Notice and Opt-in Form

Plaintiffs asks the Court to order Defendant to provide their counsel with contact information for all putative class members so that counsel can provide them with the Court-approved notice. The Court finds that it would be more appropriate to have a third-party claims administrator distribute the collective action notice. Although Plaintiffs correctly note that the Court is authorized to order the production of potential class members' contact information to Plaintiff's counsel, they have not explained why it would be preferable for their counsel to oversee distribution of the notice. Contact information for Plaintiffs' counsel will be contained in the notice, and potential class members may contact counsel if they wish.

The Court finds that providing notice by first class mail and email will sufficiently assure that potential collective action members receive actual notice of this case. Defendant's objection to the production of email addresses is baseless. The potential class members, technical support workers, are likely to be particularly comfortable communicating by email and thus this form of communication is just as, if not more, likely to effectuate notice than first class mail.

Plaintiffs' proposed 120-day deadline for potential class

members to file their consents is too long. In Reab v. Electronic Arts, Inc., 214 F.R.D. 623, 632 (D. Colo. 2002), the court approved a sixty day opt-in period. The Court sets a seventy-five day deadline.

Defendant criticizes certain language in the original proposed notice as implying an endorsement of the notice by the Court. The Supreme Court has instructed, "In exercising the discretionary authority to oversee the notice-giving process, courts must be scrupulous to respect judicial neutrality. To that end, trial courts must take care to avoid even the appearance of judicial endorsement of the merits of the action." Id. at 174. Plaintiffs' revised proposed notice submitted on October 15, 2009 adequately addresses Defendant's concerns.

B. Equitable Tolling for Potential Plaintiffs

The FLSA statute of limitations runs until a valid consent is filed. 29 U.S.C. § 256(b); Partlow v. Jewish Orphans' Home of Southern California, Inc., 645 F.2d 757, 760 (9th Cir. 1981), abrogated on other grounds by Hoffman-La Roche, 493 U.S. 165. Plaintiffs request that the Court equitably toll the limitations period on the claims of the FLSA collective action members from the date that the Complaint was filed on February 9, 2005, through the Court-set deadline for receipt of consents. They argue that equitable tolling is warranted because similarly situated plaintiffs, through no fault of their own, have been unable to opt in to, or even learn of, the lawsuit. Defendant refuses to produce contact information for potential collective action members, which, Plaintiffs claim, prevents Plaintiffs and their counsel from informing similarly situated potential plaintiffs about this case

and their right to opt in.

Partlow, the only Ninth Circuit case Plaintiffs cite to support equitable tolling, is distinguishable. In Partlow, the Ninth Circuit held that the district court could toll the statute of limitations under the FLSA for forty-five days to permit the class members who had earlier filed invalid consents, due to Plaintiffs' counsel's error, to execute proper consents. Although this holding was based largely on the court's finding that "it would simply be improper to deprive the consenting employees of their right of action," the court also pointed out that the defendant was notified of the claims of the consenting employees within the statutory period because they had filed the improper consents. 645 F.2d at 761. The Court declines at this time equitably to toll the statute of limitations.

CONCLUSION

For the foregoing reasons, the Court grants in part Plaintiffs' Motion for Approval of Hoffmann-La Roche Notice (Docket No. 123). The Court conditionally certifies the class of technical support workers with the primary duties of installing, maintaining, and/or supporting software and/or hardware, including but not limited to network engineers, but excluding PC/LAN Engineers, who were, are, or will be misclassified by Defendant as exempt from overtime pay so that Hoffmann-La Roche notice may be sent.[3] Defendant shall, within ten days of the date of this order, produce to a mutually agreed-upon third-party administrator the names,

[3]To the extent that the Court relied upon evidence to which there is an objection, the parties' objections are overruled. To the extent that the Court did not rely on such evidence, the parties' objections are overruled as moot.

addresses, alternate addresses, email addresses, social security numbers and telephone numbers of all prospective members of the class. The Court approves of the notice located at Docket No. 146 with the exception that the response period to opt-in shall be seventy-five days. Notice will proceed as detailed in this order. At this juncture, the Court will not equitably toll the limitations period on the claims of the FLSA collective action members.

IT IS SO ORDERED.

Dated: 10/26/09

CLAUDIA WILKEN
United States District Judge